Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

EDMUND KO,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether the Supreme Court should articulate the proper standard upon which a trial judge should determine when a criminal defendant, consistent with the constitutional rights to present an effective defense and confront witnesses, as well as the due process right to fundamental fairness, may require the prosecution to grant immunity to a witness.

2. Whether the introduction of the testimonial hearsay statements in this case conflicts with the Supreme Court's recent decision in Crawford v. Washington, 541 U.S. __, No. 02-9410 (March 8, 2004).

3. Whether the "Present Sense Impression" Exception, Even With respect to Non-Testimonial Hearsay, Is in Conflict with Crawford v. Washington.

Parties to the Proceedings Below

The original parties to this case are as referenced in the caption. There are no additional parties.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2003

EDMUND KO,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Petitioner Edmund Ko seeks a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, in this case.

Jurisdiction and Opinions Below

The judgment and opinion of the Appellate Division, First Judicial Department, was entered on April 22, 2003 (Appendix A), and is reported at 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003). The New York State Court of Appeals

(Kaye, Ch. J.) denied a timely application for leave to appeal to that Court, in a certificate dated January 2, 2004 (Appendix B).

The Supreme Court has jurisdiction to entertain this petition for a writ of certiorari pursuant to 28 U.S.C. §1257(a), as well as Rules 10(c) and 13 of the Rules of the Supreme Court.

Constitutional Provisions Involved

United States Constitution, **Amendment V**, provides in pertinent part:

> No person shall be...compelled in any criminal case to be a witness against himself...nor be deprived of life, liberty, or property without due process of law...

United States Constitution, **Amendment VI,** provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...

United States Constitution, **Amendment XIV,** provides in pertinent part:

> No state shall...deprive any person of life, liberty, or property, without due process of law...

Statement of the Case

A. The Indictment

Under New York County Indictment 2449/98, Petitioner **Edmund Ko** was charged with Murder in the Second Degree (New York Penal Law §125.25[1] [McKinney's 1998]). It was alleged that, on the night of March 18, 1998, he had caused the death of Columbia University law student **Lynda Hong** by cutting her throat with a sharp instrument in her ground-floor studio apartment at 548 W. 113th Street, in Manhattan.

The District Attorney theorized that Petitioner had caused Hong's death in an effort to ingratiate himself to his then current girlfriend, **Claudia Seong**, with whom he had been obsessed. Ms. Seong was said to have been insulted by comments apparently directed toward her by the deceased, Petitioner's girlfriend while they were undergraduate students at Cornell University.

B. The Defense

It was the defense to the charges that other persons had committed the offense. Specifically, the defense contended that Seong (whom the prosecution informed the jury had not been involved in the crime), along with one of her acquaintances, had possessed a far greater motive than did Edmund Ko to cause Lynda Hong's death.

C. The Court's In limine Ruling

Prior to trial, the District Attorney sought to preclude the defense from introducing certain statements attributed to Claudia Seong and her friend, both of whom had been interviewed by detectives. During oral argument on the issue, the court stated that "I think it's understood that Claudia Seong,

whether she actively participated, is an accomplice in the killing of Lynda Hong, or whether it was simply her jealousy that precipitated this murder, without her participation, that is she is a critical player." Therefore, the court ultimately allowed some, but not all, of the proffered statements.

Specifically, with respect to the defense's limited request to admit Seong's statement to police that "the bloody sweatshirt found in Lynda Hong's apartment belonged to her[]," the court, after due consideration, stated that it "believe[d] that is a statement against Ms. [Seong's] penal interest, and I am admitting it for that purpose." For her part, the prosecutor, in colloquy with the court, did not indicate that she intended to introduce other statements made by Seong during her interrogation by the police, none of which could be categorized as hearsay exceptions.

D. <u>The Prosecutor's Opening Statement</u>

In her opening statement to the jury, the prosecutor completely eliminated the personal involvement of Claudia Seong in the charged murder. The jury was therefore told that "when [Petitioner] went to Lynda Hong's apartment he went alone. Unlike the... [evidence of the uncharged assault], this was no joint undertaking by he [*sic*] and Claudia in killing Lynda Hong. Ko went to her apartment alone that night and slit her throat there."

Knowing full well, however, that Seong would be invoking the Fifth Amendment were she to be called, the prosecutor also informed the jury that it would "hear testimony that after [Petitioner] went to Lynda Hong's apartment and murdered Lynda Hong...he told Claudia Seong what he had done for her, and that he had done it for her." Defense counsel's immediate application for a mistrial in the face of this inadmissible confession, absent any representation or

expectation that Seong would be testifying, was denied. Also rejected was Counsel's alternative request that the statement be stricken. All the court did was instruct the jury that opening statements do not constitute evidence.

In the course of the trial, Seong's alleged central role as the motivational force behind Petitioner's actions was repeatedly emphasized by the prosecutor. Likewise, the "Claudia Seong" factor was repeatedly stressed by the prosecutor in her summation. In fact, at the very beginning of her closing argument, the prosecutor insisted that Petitioner "was obsessed with this woman, Claudia Seong."

E. Defense Requests to Have Claudia Seong Invoke the Fifth Amendment in the Jury's Presence

Because she was expected to invoke the Fifth Amendment when subpoenaed, defense counsel repeatedly sought to have Seong do so in the presence of the jury. Alternatively it was requested that she be forced to testify with immunity and thereupon appropriately confronted. Moreover, at the very beginning of trial, defense counsel asked if the District Attorney and the court would be willing to give Seong immunity to testify. At the time, the court stated that the application was premature, but that "[i]t's something I will think about."

Thereafter, in the middle of the trial, through inter-state process, Seong was brought into court for purposes of a hearing in furtherance of her anticipated invocation of the Fifth Amendment. Counsel then elaborated upon his two applications: First, it was urged that such invocation be in the presence of the jury, because such would "fulfill[] the compulsory process right which defendant has under the Sixth Amendment, and concomitant right in the state of New York." In this regard, counsel maintained that "given the unique facts of this case, it

is a due process right of Mr. Ko to have the witness...invoke the privilege in front of the jury."

The prosecutor, however, successfully reminded the court that the matter was within its discretion, adding:

> [I]t seems to be lost somewhere in all of this, that Ms. Seong is unavailable to both sides, and, in fact, Ms. Seong is unavailable and thus the People are incapable of bringing out what is probably some of the most damaging evidence against Edmund Ko, that fact that Edmund Ko confessed to Ms. Seong that he killed Lynda Hong and the fact that he brought back to Ms. Seong Lynda Hong's wallet to prove that he had done that.

Responding to these remarks, defense counsel sought to clarify the record:

> I don't really think it lies in the prosecution's mouth to argue to this court that they are prejudiced because the witness is unavailable to them and they would like to use the witness to bring out a lot of inculpatory information. *They have got the power to give immunity. They have said to this jury that this man alone is responsible for the killing. Give Claudia Seong immunity*. Should the prosecutor, she cannot get up in front of this court and ask your Honor to tell, to prevent me from doing this in front of the jury, that they are prejudiced. She thinks this is an important witness, she thinks she has inculpatory information to bring out from this witness, she thinks this witness will give her a slam dunk case? *Put her on the witness stand.*

> *She's got the power to give immunity.* Her lawyers in the District Attorney's Office have been going back and forth, undoubtedly back and forth for two years whether to give immunity. They've got the power. (Emphasis added.)

The court soon ruled only that Seong's invocation of the Fifth Amendment would be done outside the jury's presence. Thereafter, in the jury's absence, Seong repeatedly invoked the Fifth Amendment as to any question involving the subject of Lynda Hong's homicide.

F. The Challenged Introduction of Claudia Seong's Hearsay Statements to the Investigating Detective

In furtherance of the prosecution's wholly circumstantial case-in-chief, the District Attorney called sixty-three witnesses. They included police officers and detectives; responding fire officers; medical examiners; various forensic scientists and technicians; custodians of records/tapes/documents; the vigorously challenged complainant in an uncharged New Jersey offense which was awaiting prosecution; friends, acquaintances and a sister of the deceased, one of whom testified to "present sense impression" statements which the Appellate Division later approved, Appendix A; various other persons possessing allegedly relevant information; and several stipulations.

A central prosecutorial witness was **Detective Robert Mooney**, who had been in charge of the investigation. He was allowed to testify -- over repeated objection -- that, prior to Petitioner's arrest, when Seong had been shown photographs of a bag of clothes found at the homicide scene, she began to cry uncontrollably, and was unable to respond to any further questions for a period of time. Then, upon composing herself,

Mooney related Seong's stating that the shirt was hers, and the pants belonged to Petitioner, who also wore the shirt on occasion. (In separate testimony, Seong's roommate identified the clothes as having been shared by Seong and Petitioner.)

Mooney was then allowed to add that after again crying almost "convulsive[ly]," Seong identified the actual clothing when they were laid out on a table at the police laboratory. *At that time, according to the detective, Seong repeated her assertion that although the shirt belonged to her, Petitioner wore it often, and that the pants belonged to him.*

Although defense counsel's repeated objections were all denied, he later revisited these rulings:

> I am permitting [sic] under the confrontation clause to question this witness with respect to this conversation beyond the mere words on the page given that your Honor permitted over objection without limiting instruction to the jury, the prosecutor, not the defense, who had opposed a motion in limine to allow the defense to get it in evidence...

In response -- and without distinguishing between the limited proffer by the defense of Seong's declaration against penal interest, and the far more extensive hearsay testimony elicited by the prosecutor -- the court stated:

> There's no reason why she's not allowed [*sic*] to bring out something that you have specifically asked me to admit in evidence and I allowed you to bring in evidence under these circumstances; not allow her to bring it out in my view would be a fair – that is I allowed it counselor. That is why I allowed it.

G. Renewed Applications for Claudia Seong To be Given Immunity

Thereafter, in the face of even further prosecutorial attempts to admit Petitioner's purported confession to Seong -- which, as noted, the prosecutor, over a denied mistrial application, had already brought to the jury's attention in her opening statement -- defense counsel protested anew:

> If they want to bring out what Claudia Seong claims Edmund Ko said to her, the way they should do that is***
>
> *...Let them put Claudia Seong on the witness stand, and then the defendant, under the confrontation clause, both in the State constitution and the Federal constitution would have a right to cross-examine her.*
>
> *And they have the power and the opportunity to put her on the witness stand. And they have chosen not to do so.* (Emphasis added.)
>
> And we couldn't even begin to cross-examine.
>
> That in fact, as I asked her at the hearing, outside the presence of the jury when your Honor was overruling our objection, as she intended to do, and as she did, took the Fifth Amendment outside the presence of the jury. I asked her one of the questions: Isn't it a fact when you spoke to the police and said that Edmund Ko said this to you, you were deliberately conferring the guilt from yourself and placing it on him? You were deliberately shifting the blame to him? And she said, I take the Fifth Amendment with respect to

that question. *So now to allow her to bring that out without giving us the opportunity to cross-examine her is, in our view, it would totally violate the confrontation clause.*

And they have the power to put her on the witness stand. (Emphasis added.)

Although precluding the introduction of such testimony, the court indicated a willingness to entertain the alternative question pressed by the prosecutor, *to wit*: "was that arrest based at least in part upon something Ms. Seong told the police within the hour before Mr. Ko's arrest, yes or no[]."According to the court, "there are sometimes people adopt alternative approaches to things which are less prejudicial than other approaches and that's why we do certain things." In response, defense counsel added:

> Judge, I appreciate that. All of this in [*sic.*] the prosecutor's hands. *They have to put Claudia Seong on the witness stand.* They've told you, your Honor she's got nothing to do with this murder, *giving [sic] her the immunity that she's been begging for the murder and put her on the witness stand to ask her questions, sir.* (Emphasis added.)

Nonetheless, the court precluded the People from having the detective refer to Seong, other than as one of several people with whom the police had been speaking prior to arresting Petitioner. The court, therefore, merely sustained the defense objection to the proposed testimony without ruling on the application for Seong to be immunized.

Ultimately, the jury convicted Petitioner of the charged offense. The court later sentenced him to a term of imprisonment

of twenty-five years to life.

H. The New York Appeals

On appeal of the judgment to the Appellate Division, First Judicial Department, Petitioner raised several issues, including:

> a) Whether, under the unique circumstances of this case, where the entire prosecutorial theory, including the evidence of uncharged criminality, was premised upon Defendant's purported relationship with a certain individual whose highly prejudicial hearsay statements were even elicited over protest from a police witness, the District Attorney's repeated and unexplained refusal to grant such person immunity following her invocation of the Fifth Amendment deprived Defendant of his due process right to a fair trial, as well as his federal and state constitutional rights to confront witnesses and present a defense;

and,

> b) Whether the introduction of highly prejudicial hearsay statements by Claudia Seong to Detective Mooney deprived defendant of a fair trial and undermined his rights of confrontation.

The District Attorney argued that the first issue was not preserved, since Petitioner had not specifically stated an intention to call Seong as a defense witness and request that she be given immunity:

> [T]hose cited portions make clear that counsel

> was not complaining that Seong's immunized status impacted on his right to a fair trial. Instead, he was complaining that the *People should not have been permitted to elicit her statements through Detective Mooney on their direct case*; according to defendant, *Seong was not unavailable to the People for hearsay purposes since they could have granted her immunity*...That was a very different issue indeed from the one defendant is raising now. (Emphasis added.)

In responding to the second issue, the District Attorney relied solely upon the original defense request to introduce Seong's admitted ownership of the shirt to Mooney (as a declaration against Seong's penal interest). It was thus submitted that this anticipated defense testimony supported the introduction, in the prosecution's case-in-chief, over defense objection, of Seong's statements to Mooney identifying the pants found at the homicide scene as belonging to petitioner (even though these later statements raised no valid hearsay exception). According to the District Attorney, "defendant seems to conveniently to forget that it was he who requested that these statements be admitted even though they constituted hearsay..."

In a reply brief to the Appellate Division, Petitioner initially demonstrated that the immunity question had been appropriately preserved in the record for the court's review. As to the issue of the improper introduction of Seong's hearsay statements, the following was recalled from Petitioner's principal brief:

> [a]ll things considered, had Claudia been subject to cross-examination, *which the introduction of such hearsay surely circumvented*, it is quite possible that her declarations to Mooney, so

> strongly inculpating Defendant, could have been severely undermined. However, because all the jury heard was highly prejudicial, rank hearsay, which nestled with impunity in the jurors' minds *by virtue of the Defense's lack of any opportunity to subject the declarant to cross-examination* ...[citations omitted], the judgment of conviction must be reversed. (Emphasis added.)

The Appellate Division addressed the merits of both issues. Nevertheless, as to the immunity issue, it ruled against Petitioner's contention:

> Defendant was not deprived of any constitutional rights by the People's refusal to grant immunity to his new girlfriend (*see* People v. Adams, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902 [1981]; People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422 [1980]). There was no bad faith or abuse of prosecutorial discretion. Furthermore, defendant's inability to call the new girlfriend as a witness because of her assertion of her Fifth Amendment privilege did not adversely affect his defense.

Appendix A.

As the question of the introduction of Seong's testimonial hearsay statements to Det. Mooney, the Appellate Division likewise held against Petitioner:

> The other challenged rulings were proper exercises of discretion which did not deprive defendant of his right to confront witnesses and present a defense (*see* Crane v. Kentucky, 476 U.S. 683, 689-690 [1986]; Delaware v. Van Arsdall, 475 U.S. 673, 678-679 [1986]).

Appendix A.

Leave to appeal to the New York Court of Appeals was thereafter denied by Chief Judge Kaye. Appendix B.

Reasons for Allowance of the Writ

A. The Supreme Court Should Articulate the Proper Standard upon Which a Trial Judge Should Determine When a Criminal Defendant, Consistent with the Constitutional Rights to Present an Effective Defense and Confront Witnesses, As well as Due Process, May Require the Prosecution to Grant Immunity to a Witness

There is initially presented in this petition the issue as to whether the Appellate Division has "decided an important question of federal law that has not been, but should be, settled by this Court..." Supreme Court Rules, Rule 10(c). Petitioner submits that this case satisfies these prerequisites.

Specifically, certain procedural guarantees are sacrosanct at criminal trials, and arise out of the Due Process Clause of the Fourteenth Amendment. For example, the right to present a defense, pursuant to the Sixth Amendment, has been referred to as one of the "minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *see also* Washington v. Texas, 388 U.S. 14, 20 (1967).

Part of this Sixth Amendment right, of course, is the ability of an accused to call witnesses whose testimony is "material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). Yet, as demonstrated in this case, that ability can be severely hampered when a prosecutor, absent any obligation to demonstrate a

rationale for such decision, refuses to grant immunity to a person whom the defense has demonstrated is central to a viable defense. It is essential that the Supreme Court determine whether such prosecutorial power is not without limitation, and may, under certain circumstances, result in an abuse of discretion.

In this regard, to date, it appears that the Supreme Court, and certainly the courts of New York, have not clearly delineated an appropriate standard under which to determine the propriety of such a prosecutorial refusal, and whether mere arbitrariness, *vel non*, can amount to a deprivation of fundamental fairness. For example, in People v. Chin, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646 (1986), the New York Court of Appeals noted:

> [T]he prosecutor's discretion to confer immunity on witnesses called by defendants is quite broad (New York CPL §50.30 [McKinneys 2003]; People v. Owens, 63 N.Y.2d 824, 482 N.Y.S.2d 250 [1984]; People v. Adams, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902 [1981]; People v. Shapiro, 50 N.Y.2d 747,431 N.Y.S.2d 422 [1980]; People v. Sapia, 41 N.Y.2d 160, 391 N.Y.S.2d 93 [1976], *cert. denied* 434 U.S. 823). That discretion will not be deemed to have been abused unless, for example, the prosecutor builds his case with immunized witnesses but denies the defendant a similar opportunity (*see, e.g.*, People v. Adams, *supra*, 53 N.Y.2d at p. 247).

That nebulous standard, referenced by the Appellate Division citations to Adams and Shapiro, Appendix A, allows for no more than an *ipse dixit* determination by a reviewing court that there was no abuse of prosecutorial discretion. But that offers little, if any, guidance to trial judges in future cases. Thus, *nisi prius* courts have no cognizable test to apply as to what, in a proper case, rises to a level of unconstitutional abuse, and

hence, amounts to a due process deprivation in violation of the Fourteenth Amendment.

The New York Court of Appeals' other decisions in this area, all of which antedated Chin, offer no greater illumination. *See e.g.* People v. Arroyo, 46 N.Y.2d 928, 930, 415 N.Y.S.2d 205, 206 (1979), where, amidst a finding of no denial of due process, the court simply stated that "[i]t suffices for present purposes to note that the witness here was not an agent of the law enforcement authorities or otherwise in any way a part of the prosecutorial apparatus...[citing Sapia]." However, the Court never articulated any standard of analysis in furtherance of determining precisely what being "part of the prosecutorial apparatus" might entail.

Even in Shapiro *supra,* wherein the Court of Appeals actually reversed an affirmance of a conviction, the decision in support of such a rare action was no more enlightening. There, the court was confronted with a situation which it viewed to be distinct from what had been involved in Sapia and Arroyo. In Shapiro, confronted with the prosecutor's insistence that certain defense witnesses testify consistently with their prior testimony, those individuals called by the defense invoked the Fifth Amendment in the absence of prosecutorial grants of immunity for any possible perjury charges.

Though addressing its due process-based discussion in Sapia, the Court of Appeals merely concluded that "there are times when the exercise of this constitutional right may press on a defendant's due process right to a fair trial and to compulsory process (U.S. Const., 6th, 14th Amendments., N.Y. Const. art. I, sec. 6)" (50 N.Y.2d at 760). Thus, without setting forth any guidelines in furtherance of measuring the bounds of such standards, the court merely declared:

Given that the power to confer immunity and

> thereby to compel testimony from a witness who asserts his privilege resides within the discretion of the prosecutor (see New York Criminal Procedure Law §50.20, subd. 2, par. [b]), in an appropriate case it is not too much to expect that the exercise of this prosecutorial discretion be tempered by an obligation to respond to such a problem. On that principle, in cases in which witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or in ones where the failure to grant immunity deprives the defendant of vital exculpatory testimony, due process may be violated (*see* People v. Sapia, *supra*, at p. 166; People v. Arroyo, *supra*, at p. 930; Earl v. United States, D.C.Cir., 361 F.2d 531, 534, n.1 (Burger, J.), *cert. den.* 388 U.S. 921; United States v. Gaither, D.C.Cir., 539 F.2d 753 (Bazelon, J., statement on denial of rehearing en banc), *cert. den.* 429 U.S. 961; United States v. Saettele, 8 Cir., 585 F.2d 307, 310-314 (Bright, J., dissenting); State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 890; Westen, Compulsory Process Clause, 73 Mich.L.Rev. 71, 166-170; Note, Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv.L.Rev. 1266).

Shapiro, *supra*, 50 N.Y.2d at 760, 431 N.Y.S.2d at 429.

In stark contrast, the United States Courts of Appeals have promulgated at least two distinct modes of analysis in this area. They include an "effective defense" standard on the one hand, and a "prosecutorial misconduct" standard on the other. *See* United States v. Angiulo, 879 F.2d 1169, 1190-92 (1st Cir.

1990) (contrasting these distinct modes of analysis, and collecting cases); United States v. Mohney, 949 F.2d 1397, 1401 (6th Cir.) (same), *cert. denied*, 504 U.S. 910 (1992); United States v. Capozzi, 883 F.2d 608, 613-614 (8th Cir. 1989) (same), *cert. denied*, 495 U.S. 918 (1990); *See also* Carter v. United States, 684 A.2d 331, 338-45 (D.C. Ct. App. 1996) (en banc) (same).

The minority approach, *i.e.*, the "effective defense theory," "holds that a court has the inherent power to immunize witnesses whose testimony is essential to an effective defense."Angiulo, 879 F.2d at 1190. This "effective defense" standard of analysis, alone embraced by the **Third Circuit**, *see* Government of Virgin Islands v. Smith, 615 F.2d 964, 969-74 (3rd Cir. 1980), adheres to the notion "that when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the Government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial." Angiulo, 879 F.2d at 1191. *See also* United States v. Santtini, 963 F.2d 585, 597, 598, n. 6, 599 (3rd Cir. 1992) (discussing Smith and noting the criticism thereof, as well as the limiting of its applicability, in subsequent decisions).

The latter, "prosecutorial misconduct" standard, is relied upon by most other Circuits. Generally, it entails an analytical approach where the district court requires a prosecutor to grant immunity to a defense witness, at risk of dismissal or judgment of acquittal, "where there exists prosecutorial misconduct arising out of the Government's deliberate effort to distort the fact-finding process." Angiulo, 879 F.2d at 1190.

For example, the **Second Circuit**, as reiterated in United States v. Bahadar, 954 F.2d 821, 826 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992) has enunciated a long-standing "three-part test

for requiring the government to grant defense witness immunity at the risk of dismissal of the indictment." *See also* United States v. Diaz, 176 F.3d 52, 115 (2d Cir.), *cert. denied sub. nom.*, Rivera v. United States, 528 U.S. 875 (1999); United States v. Turkish, 623 F.2d 769, 773 (2d Cir. 1980), *cert. denied*, 449 U.S.1077 (1981). According to this sequential analysis,

> **first**, the district court must find that the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the fifth amendment. **Second**, the witness's testimony must be 'material, exculpatory, and not cumulative.' **Third,** the testimony must be unobtainable from any other source.

The remaining courts of appeals have pursued different variations of this mode of analysis, in one approach or another. Some have held that a district court has residual authority to grant immunity on its own initiative, and others have determined that the only authority vested in the district court is to compel the prosecutor, in the face of certain factors, to consent to immunity at pains of sanctions. Additionally, while most circuit courts have discussed the defense proffer in terms of "exculpatory," the Ninth Circuit requires only that the proposed testimony be "relevant."

First Circuit

United States v. Angiulo, *supra,* 879 F.2d at 1191-1192 ("Despite the nearly universal rejection of the effective defense theory, courts have held that the due process clause does constrain the prosecutor to a certain extent in her decision to grant or not to grant immunity. If a prosecutor abuses her discretion by intentionally attempting to distort the fact-finding

process, then a due process violation exists and court my order the prosecutor to grant immunity or face a judgment of acquittal.");

Fourth Circuit

United States v. Abbas, 74 F.3d 506, 512 (4th Cir.) ("the district court is without authority to confer immunity *sua sponte* [citing United States v. Klauber, 611 F.2d 512, 517 (4th Cir. 1979)]...And the prosecution is vested with the sole discretion to grant immunity...On occasion, however, the district court can compel the prosecution to grant immunity..."), *cert. denied*, 517 U.S. 1229 (1996);

Fifth Circuit

United States v. Chagra, 669 F.2d 241, 258-59 (5th Cir. 1982) ("This Circuit has consistently held that a district court does not possess the statutory, common law, or inherent authority either to grant use immunity to a defense witness over the government's objection or to order the government to do so. ...[footnote omitted]. At the same time, we have suggested without deciding that the federal constitution may in some extraordinary circumstances require either defense witness immunity or some remedial action by a district court to protect a defendant's right to a fair trial...[footnote omitted]", citing, *inter alia*, United States v. Thevis, 665 F.2d 616, 639 [5th Cir. Unit B], *cert. denied*, 456 U.S. 1008 [1982]), *reh. denied*, 673 F.2d 1321 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982);

Sixth Circuit

United States v. Emuegbunam, 268 F.3d 377, 401 (6th Cir. 2001) (rejecting the "effective defense exception" by noting that "[w]e have consistently held that a district court is without authority either to grant immunity to a witness who asserts his

Fifth Amendment privilege against self-incrimination or to force the government to do so" [citing United States v. Mohney, *supra* and United States v. Talley, 164 F.3d 989, 997 (6th Cir.), *cert. denied*, 526 U.S. 1137 (1999) (internal quotes omitted)]. On the other hand [again citing Talley], although "[i]mmunity might be warranted to remedy prosecutorial misconduct..., [w]e have yet to decide whether immunity represents a valid remedy for such conduct."), *cert. denied*, 535 U.S. 977 (2002);

Seventh Circuit

United States v. Hooks, 848 F.2d 785, 799-803 (7th Cir. 1988) ("the trial court lacks authority to provide immunity for a defense witness absent a request by the Government...Indeed the court is powerless to direct the government to seek immunity for a defense witness who exercises his fifth amendment privilege against self-incrimination.***Nevertheless the prosecutor's power to seek or to refuse immunity is limited by the constitutional right to due process of law. Accordingly, this appellate court will not review a prosecutor's immunization decisions in the absence of a substantial evidence showing that the prosecutor's actions amounted to a clear abuse of discretion violating the due process clause" [internal quotes omitted]); United States v. Taylor, 728 F.2d 930, 935 (7th Cir. 1984) (same); *But see* United States v. Herra-Medina, 853 F.2d 564 (7th Cir. 1988) ("In an appropriate case the refusal of the government to immunize a defense witness might be at once so damaging to the defense and so unjustifiable in terms of legitimate governmental objectives that the refusal to grant immunity would be a denial of due process of law to the defendant and preclude his conviction...");

Eighth Circuit

United States v. Capozzi, *supra*, 883 F.2d at 613-614 ("Neither the Supreme Court nor this Court have ruled on

whether a court has inherent authority to grant or use immunity. We have, however, previously indicated our doubt that such a power lies in the judiciary."*** "Every court of Appeals which has considered the question has rejected the Third Circuit's *Smith* holding as being in violation of the doctrine of separation of powers" *** "Even assuming a district court has authority to immunize defense witnesses, unaided by 18 U.S.C. §§6002 and 6003, it is clear that such an order is an extraordinary remedy, to be used sparingly, and then only where the proffered evidence is *clearly exculpatory*...[footnote and internal quotes omitted] [emphasis in original]."); United States v. Blanche, 149 F.3d 763, 769 (8th Cir. 1998) (discussing Capozzi and stating that "we again decline to resolve the ultimate question of whether a court has inherent authority to fashion such extraordinary relief as judicial immunity of potential defense witnesses..., where palpable judicial or government interference has been shown."[internal quotes omitted]);

Ninth Circuit

United States v. Lord, 711 F.2d 887, 891-92 (9th Cir. 1983) (We agree with the Third Circuit's holding in Government of Virgin Islands v. Smith, *id.* at 968, that an unrebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony justifies remand for an evidentiary hearing. Therefore, we reverse and remand this case for an evidentiary hearing on whether the prosecutor intentionally distorted the fact-finding process by deliberately causing Cook to invoke his fifth amendment privilege. If the district court finds such prosecutorial misconduct by a preponderance of the evidence...[footnote omitted], it should enter a judgment of acquittal for Lord unless the prosecution invokes 18 U.S.C. §6002-6003 by asking the district court to extend use immunity to Cook at a new trial."); United States v. Westerdahl, 945 F.2d

1083, 1086-88 (9th Cir. 1991) ("to satisfy the first prong of the *Lord* test, a defendant need not show that the testimony sought was either 'clearly exculpatory' or 'essential to the defense'; the testimony need only be relevant." *** As to the second *Lord* prong, "misconduct is not confined solely to situations in which the Government affirmatively induces a witness not to testify in favor of a defendant."); *Accord*: United States v. Young, 86 F.3d 944, 948 (9th Cir. 1996).

Tenth Circuit

United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982) ("Courts have no power to independently fashion witness immunity under the guise of due process." However "where the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process, a court could force the government to choose between conferring immunity or suffering acquittal [citing Government of Virgin Islands v. Smith, *supra*]); *Accord:* United States v. Chalan, 812 F.2d 1302, 1310 (10th Cir. 1987), *cert. denied,* 488 U.S. 983 (1988); United States v. LaHue, 261 F.3d 993, 1014-15 (10th Cir. 2001);

Eleventh Circuit

United States v. Gottesman, 724 F.2d 1517, 1524 (11th Cir. 1984) (Court holds that it is bound by the Fifth Circuit decision in United States v. Thevis, *supra*, though noting that "[w]e recognize that a compelling argument can be made for a judicial grants of use immunity in extraordinary cases where prosecutorial misconduct has occurred in the handling of the immunity process" [citing the Fourth Circuit's decision in United States v. Klauber, *supra*]), *reh. denied*, 729 F.2d 1468 (11th Cir. 1984), *abrogated on other grounds*, Dowling v. United States, 473 U.S. 207 (1985);

District of Columbia Circuit

United States v. Perkins, 138 F.3d 421, 424 (D.C. Cir.) (Upon court's discussing United States v. Lugg, 892 F.2d 101 [D.C. Cir. 1989]; and United States v. Heldt, 668 F.2d 1238 [D.C. Cir. 1981], *cert. denied*, 456 U.S. 926 [1982], it was reaffirmed that "it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness." [internal quotes omitted]. Court recalled, however, that in Lugg it had been noted that "[s]ome cases have indicated that the government may be compelled to grant defense witness immunity in 'extraordinary circumstances."), *cert. denied*, 523 U.S. 1143 (1998). *But see* Earl v. United States, *supra*, (Burger, J.) 361 F.2d at 534, n. 1; United States v. Gather, *supra*.

District of Columbia Court of Appeals

Carter v. United States, *supra*, 684 A.2d at 338-45 (upon rejecting Government of Virgin Islands v. Smith, court stated: "Preliminarily, we agree with the overwhelming number of courts, especially in the federal circuits, that have rejected the concept of *judicially imposed* immunity" [emphasis in original].*** "We agree with most federal circuit courts which have adopted what has been termed the 'prosecutorial misconduct' doctrine...[footnote omitted].")

* * *

This instant case presents an appropriate vehicle for the Supreme Court to finally address this issue and delineate the appropriate standard of analysis. Here, there is not presented a run-of-the mill immunity issue which merely involves some tangential witness sought to be called by the defense, who is said to possess information which might exculpate the Petitioner. Rather, Claudia Seong was the central figure around whom the

prosecution's entire case was theorized and developed. She was likewise integral to the strongly protested evidence of uncharged criminality, as well as to the repeatedly challenged hearsay statements, wherein her veracity remained unfettered by cross-examination. *See infra*.

Under such circumstances, depending on what standard of analysis might be embraced by this Court pursuant to plenary review, the arbitrary refusal to call Seong to the stand under a grant of immunity -- where the prosecutor specifically told the jury that Seong had not been involved in the charged homicide -- might well be viewed as having completely undermined Petitioner's due process right to confront relevant witnesses and properly defend himself against these charges.

Finally, if called upon to provide a response, Supreme Court Rules, 15(1), the prosecutor, as in the New York courts, will undoubtedly insist that this issue has not been properly preserved. It will thus be contended that the references to the record,

> make clear that counsel was not complaining that Seong's immunized status impacted on his right to a fair trial. Instead, he was complaining that the People should not have been permitted to elicit her statements through Detective Mooney on their direct case; according to defendant, Seong was not unavailable to the People for hearsay purposes since they could have granted her immunity

Although that position certainly gives great vitality to Petitioner's second question presented, *see, infra*, suffice it for present purposes that in the face of any renewed dispute as to preservation, the Appellate Division saw fit to address the merits of Petitioner's claim. Thus, even though this contention was

rejected on the merits, that court at least concluded that the issue had been sufficiently deserving of review.

B. The Supreme Court Should Evaluate this Conviction Under the Principles Enunciated in Crawford v. Washington, _U.S._, No. 02-9410, March 8, 2004; Alternative to Plenary Review, this Case Should be Remanded to the Appellate Division, First Judicial Department for Further Consideration as to Whether the Introduction of the Testimonial Hearsay Statements of Claudia Seong Is in Conflict with Crawford

Just days ago, in Crawford v. Washington, 541 U.S.__, No. 02-9410, March 8, 2004 , this Court determined that "[w]here testimonial evidence is at issue..., the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Slp. opn., at 33. Further, "testimonial" evidence was held "at a minimum" to apply to statements arising out of "police interrogations." *Id.*

In this case, the obviously devastating hearsay statements of Claudia Seong -- who, in her interrogation by Detective Mooney, identified clothes found at the homicide scene as belonging to Petitioner -- appear to meet all the elements prescribed in Crawford. The statements had been made in the course of a police interrogation; the declarant Seong was unavailable at trial due to her invocation of the Fifth Amendment, United States v. Salerno, 505 U.S. 317, 320 (1992); Lee v. Illinois, 476 U.S. 530, 551 (1986) (Blackmun, J., dissenting), United States v. Jackson, 335 F.3d 170, 177 (2d Cir. 2003); and Petitioner, owing to the District Attorney's refusal to bestow immunity on Seong (despite informing the jury that she had not been involved in the charged crime), never had an

opportunity to subject her testimonial statements to cross-examination.

It is also clear that counsel made timely objections to such testimonial statements -- which, unlike the declarations against her penal interest sought to be admitted by the defense, boasted no hearsay exception. Consequently, on this record, the constitutional concerns expressed in Crawford had been adequately brought to the trial judge's attention.

Indeed, as noted, even in the District Attorney's responding brief to the Appellate Division, wherein the reviewability of the issue concerning the request that Seong be given immunity was challenged (*see ante*), it was stated that defense counsel was clearly "complaining that the People should not have been permitted to elicit her statements through Detective Mooney on their direct case; according to defendant, Seong was not unavailable to the People for hearsay purposes since they could have granted her immunity."

As an alternative to plenary review, it is submitted that the petition should be granted and the matter remanded to the Appellate Division for further consideration in light of Crawford. *See* Wainwright v. Goode, 464 U.S. 78, 88 (1983) (Brennan, J. dissenting) ("When an intervening decision of this Court may affect a lower court's decision, our practice has generally been to grant the petition for certiorari, vacate the lower court judgment, and remand for further consideration in light of the intervening decision... [citing Wainwright v. Henry, 463 U.S. 1223 (1983)]); *See also* Hill v. Colorado, 519 U.S. 1145 (1997); Friend v. United States, 517 U.S. 1152 (1996); Stutson v. United States, 516 U.S. 193 (1996); Lankford v. Ohio, 486 U.S. 1051 (1988).

C. The Supreme Court Should Determine Whether the Introduction of a "Present Sense Impression" Statement, Based on the Mere Finding of "Some Indicia of Reliability," Is in Conflict with Crawford v. Washington

Also introduced in support of Petitioner's conviction was the testimony of one of Lynda Hong's friends, who recalled a telephone conversation with her close to the probable time of her death. At that time, moments after indicating through an equally challenged "declaration of intent," Appendix A, that Ed was "coming over," Hong stated "it's Ed; I have to go." *Id.* This testimony, introduced as a "present sense impression" statement, was later sanctioned by the Appellate Division, on constraint of People v. Brown, 80 N.Y.2d 729, 594 N.Y.S.2d 696 (1993), over Petitioner's argument that, given the deficient corroboration, his confrontation rights had been severely undermined.

The Brown court had earlier justified such "present sense impression" statements, given the lack of opportunity for cross-examination, only if they were supported by "some additional indicia of reliability." 80 N.Y.2d at 736, 594 N.Y.S.2d at 701. Yet, this Court, which has not yet addressed this exception, has now stated in Crawford that the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." Slp. opn. at 18.

To be sure, the statement admitted in this case was not "testimonial," in the sense that it had been given to law enforcement officials. The result in Crawford, however, was also premised, in large part, on the notion that "[d]ispensing with confrontation because testimony is reliable is akin to dispensing with jury trial because a defendant is obviously guilty." Slp. opn.

at 27. It was for that reason that the rationale in support of Ohio v. Roberts, 448 U.S. 56 (1980) was vitiated and found to be inimical to the origins of the confrontation clause.

Accordingly, even though the "primary object" of the Sixth Amendment is "testimonial hearsay," Crawford, slp. opn. at 17, that is "not" to say that the Sixth Amendment is "solely concerned with testimonial hearsay." *Id.* Therefore, because the minimal corroboration requirement for "present sense impression" statements, under the New York rule, is completely at war with the constraints of the confrontation clause, it is respectfully submitted that the Supreme Court should determine if that exception, *see also*, Fed Rules Evid. 803(1), as articulated in People v. Brown, can survive the level of constitutional scrutiny now reinvigorated in Crawford. *Cf.* Brown v. Keene, 355 F.3d 82, 88 (2d Cir. 2004) (Because the subject evidence did not satisfy its elements, the Second Circuit found no need to determine "whether the hearsay exception for reports of a present sense impression is firmly rooted, so as to satisfy the requirements of the Confrontation Clause," as articulated in Ohio v. Roberts.

Conclusion

The Petition for a Writ of Certiorari Should Be Granted; Alternatively, the Petition Should Be Granted and the Matter Remanded to the Appellate Division, First Department, for Further Consideration in Light of Crawford v. Washington.

Dated: New York, New York
March 22, 2004

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK DATED APRIL 22, 2003

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

EDMUND KO,

Defendant-Appellant.

April 22, 2003

Nardelli, J.P., Mazzarelli, Rosenberger, Ellerin, and Gonzalez, JJ.

Judgment, Supreme Court, New York County (Harold Beeler, J.), rendered October 16, 2000, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The victim's statement to a friend in a telephone conversation shortly before the murder that "It's Ed. I have to go" was properly admitted under the present sense impression exception to the hearsay rule (*see People v. Brown*, 80 N.Y.2d 729). The statement was a spontaneous description of events as they were unfolding, and the

requirement of corroboration was fully satisfied by extensive circumstantial evidence including forensic evidence. Since the statement that defendant had actually arrived at the victim's apartment was properly admitted, any error with respect to the victim's prior declaration of defendant's intention to do so was harmless because such evidence was superfluous, and because of the overwhelming evidence of defendant's guilt.

Where the People's theory was that defendant murdered his former girlfriend to placate and impress his new girlfriend, the court properly exercised its discretion in ruling that defendant's participation with the new girlfriend in a knife attack on another one of his former girlfriends a few months before the murder was admissible on the issue of motive (*see People v. Walker*, 293 A.D.2d 411, *lv. denied* 98 N.Y.2d 682; *People v. Willsey*, 148 A.D.2d 764, *lv. denied* 74 N.Y.2d 749). The probative nature of this evidence outweighed any prejudicial effect. This evidence had a direct bearing on motive, because both crimes were committed for a very specific common purpose. The People were entitled to explain to the jury why defendant would kill a former girlfriend from whom he had separated on friendly terms and against whom he bore no apparent animosity.

Defendant was not deprived of any constitutional rights by the People's refusal to grant immunity to his new girlfriend (*see People v. Adams*, 53 N.Y.2d 241, 247; *People v. Shapiro*, 50 N.Y.2d 747). There was no bad faith or abuse of prosecutorial discretion. Furthermore, defendant's inability to call the new girlfriend as a witness because of her assertion of her Fifth Amendment privilege did not adversely affect his defense.

The court correctly determined that mitochondrial DNA analysis has been found reliable by the relevant scientific community, and that issues regarding contamination go to the weight to be given such evidence (*People v. Klinger*, 185 Misc.2d 574). We also note that many jurisdictions have accepted this type of DNA evidence (*see e.g. People v. Holtzer*, __ N.W.2d __ [Feb. 25, 2003], 2003 WL 722452 [Mich. App.]; *State v. Pappas*, 256 Conn. 854, 866-890, 776 A.2d 1091, 1101-1113).

The other challenged rulings were proper exercises of discretion which did not deprive defendant of his right to confront witnesses and present a defense (*see Crane v. Kentucky*, 476 U.S. 683, 689-690; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-679).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 22, 2003

s/ David Spokany
DEPUTY CLERK

CLERK

APPENDIX B — ORDER OF THE NEW YORK STATE COURT OF APPEALS DENYING PERMISSION TO APPEAL, DATED JANUARY 2, 2004

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

EDMUND KO,

Appellant.

CERTIFICATE DENYING LEAVE

I, JUDITH S. KAYE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certification pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
January 2, 2004

s/ Judith S. Kaye
Chief Judge

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* Order of the Appellate Division, First Department, entered April 22, 2003, unanimously affirming a judgment of the Supreme Court, New York County, rendered October 16, 2000.